IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

L.P.A.No.141 of 1996

In

Writ Petition No.2733 of 1996

Mackinon Mackenzie Ltd. ..Appellants

(Orig.Respdt in ULP)

V/s

G.S.Baj and Ors. ..Respondents

(Respdt no.2 Orig.

Complainannt in ULP)

Shri J.P.Cama i/b Shri Anilkumar for Appellant

Shri Anand Grover i/b Shri Prakash Mahadik for Respondent

CORAM:S.B.MHASE & S.R.SATHE,JJ.

DATED: 5th May 2006

ORAL JUDGMENT :- (Per S.R.Sathe,J)

1. Mackinnion Mackenzie and Co. Ltd. original Respondent in Complaint (ULP) No.1081 of 1992 and Petitioner in Writ Petition No.2733 of 1996 has preferred this Letters Patent Appeal against the judgment and order passed by the Hon'ble single Judge of this Court, whereby, the order passed by the Member, Industrial Court, Mumbai declaring that Respondent company has

committed unfair labour practice under Item No.9 of Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (hereinafter for the sake of convenience refer to as MRTU AND PULP Act), as there was non observance of Rule 81 of the Industrial Disputes (Bombay) Rules, 1957 and Section 25G of the Industrial Disputes Act 1947 was held, legal and valid and writ petition was rejected.

2. For the sake of convenience hereafter the parties shall be referred to as the complainant union and Respondent company.

. Brief facts giving rise to this L.P.A. are as under:-

. The Respondent Company was engaged in the business of shipping, ship owning, managing ships and operating, clearing and forwarding, overseas recruitment and property owning and development. The complainant union is registered under Trade Union Act 1956. The Respondent company in its establishment at Ballard Pier, Bombay ha approximately 150 employees who were all workmen and members of the complainant union. According to the complainant union, whenever there used to be any issue pertaining to the services of workmen or about their voluntary retirement etc. the Respondent company used to have negotiations with the complainant union. Thus there was a custom, usage and practice amounting to a condition

of service and an agreement viz. any major decision affecting their members or employees is always used to be discussed with the complainant union before its implementation.

3. Some time the last week of July 1992 there was a rumour in the company that large number of workers are going to be retrenched. The member of the complainant union therefore met the general manager of Respondent company on 30-7-1992 and he also confirmed the rumour and told them that retrenchment notices would be issued. Immediately thereafter i.e. on 31-7-1992 one of the member of the complainant union viz. A.P.Rodguries received a letter dated 27-7-1992 purportedly to be a notice of retrenchment effective on closing of business on 4-8-1992. It was stated in the said notice/letter that retrenchment compensation and one month salary in lieu of notice is being paid to him. The copy of the statement of reasons for retrenchment was also attached to the said notice. In the said statement of reasons it was mentioned that as a result of recession in the industry from 1988 the accumulated losses which were to the tune of Rs.12-41 crores in 1983 reached to Rs.70 crores. It was specifically mentioned in the statement of reasons that some of the departments of the company are being closed. The departments which were to be closed and which were to be continued, were also specified in the said statement of reasons.

4. On perusal of the said notice as well as statement of reasons the complainant union found that Respondent company had not fulfilled the condition precedent under Section 25F of Industrial Dispute Act while taking any action for retrenchment nor they had sent notice required to be forwarded under prescribed proforma to the State Government. The company had also not published seniority list of workmen in different categories from which retrenchment was contemplated, as was required under Rule 81 of the Industrial Disputes (Bombay) Rules 1957. Besides this, there was also non compliance of the provisions of Section 9A of Industrial Disputes Act. The complainant union also noticed that though the Respondent Company had mentioned that various divisions of the company are going to be closed down they had not followed the procedure required under Section 25FFA of Industrial Disputes Act and as a result of which it was necessary for the company to issue notice at least 60 days before the intended closure, to the State Government.

5. The Respondent company had also not called upon the trade union for discussion and negotiations before taking the decision of closing down the certain departments and consequently carrying out the process of retrenchment and thus the company had committed unfair labour practice under Item no.9 of Schedule IV of the Act.

6. Admittedly, at the time of retrenchment, the company is required to follow the procedure laid down in Section 25G of Industrial Disputes Act. As per the principle laid down in the said section, the person last employed in a particular category has to go first. However, it was noticed that large number of senior workers were retrenched and those who were junior to them were retained and thus there was a clear violation of Section 25G of the Industrial Dispute Act. Hence on all these grounds the complainant union filed the above mentioned complaint application before the Industrial Court, Mumbai and prayed for a declaration that notice issued by the Respondent company regarding retrenchment of the workers of the company union is illegal and the company has thereby committed unfair labour practice under Item 9 of Schedule IV of MRTU AND PULP Act. Complainant union also prayed that Respondent company be directed to continue the workmen to whom notices of retrenchment have been issued and whose names appeared at Exh.E attached to the complaint shown without asterisk (*) against their names, in service and pay them their full wages from month to month.

7. On the date of filing of the complaint, the complainant union also filed an application for exparte ad-interim relief and after hearing the learned Advocate for the complainant union the learned Member, Industrial Court was pleased to grant interim relief in terms of

prayer clause (a) whereby operation of the notices of retrenchment issued to the members of the complainant union, a list of whom was annexed as Exh.E with the complaint was stayed.

8. The Respondent company filed its written statement and took several contentions. Firstly, the Respondent contended that the order regarding interim relief granted in favour of the complainant union was received by them through the notice of the Advocate of the complainant on 4-8-1992 at about 5-30 p.m. when in fact retrenchment of the employees had come into effect at the close of business on 4-8-1992 on 4-35 p.m. Not only that but by that time the possession of the premises where the retrenched workers were employed was handed over to other 3 independent companies namely Ardeshir B. Crestjee and Co. Mackinnon Abad and Co. and Urmila and co. Pvt. Ltd. As a result of the leave and license agreement executed with them on 28-7-1992, the occupation of the premises however was differed upto 4-8-1992. The Respondent company also contended that they replied the complainant's Advocate notice dated 4-8-1992 through their Advocate and brought to the notice of the complainant all the aforesaid facts and informed them that members of the complainant union to ensure that the members of the complainant union do not create any obstruction, coercion or intimidation to the Respondent's licensees or their assets.

9. The Respondent Company contended that on 5-8-1992 about 200 members and strangers forcibly tried to enter the premises given to the licensees and as a result of the said incident, two of the said licensees viz. Urmila and Co. Pvt. Ltd and Ardeshir B. Crsetjee and Co.Pvt. Ltd. filed a suit in Bombay High Court bearing Suit Lodging No.2421 of 1992 seeking inter alia to restrain such conduct by the complainant union and its members and the court was pleased to pass an order on 11-8-1992 granting interim relief in favour of the said licensees and restraining the members of the complainant union from forcibly entering in the premises, given to the licensees.

10. The Respondent company further contended that there were in all 149 employees in their Bombay establishment prior to retrenchment. They admitted that previously at some time, there were some discussions and meetings with the complainant union with regard to the matters pertaining to the workmen but according to them that by itself would not constitute a custom, usage and/or practice amounting to a condition of service and/or agreement, that all major decisions affecting members or employees must always and invariably be discussed with the company union before its implementation. According to the Respondent in the last week of July 1992 i.e. 27-7-1992 they had displayed a seniority list within the

meaning of Rule 81 of the Industrial Disputes (Bombay) Rule 1957. Even the members of the complainant union were aware about the critical financial position of the company. The Respondent admitted that on 30-7-1992 the members of the complainant union met the General Manager of the Respondent company and members were informed about the retrenchment but there was no other talk with them because the Respondent company had already displayed seniority list and notice. According to the Respondent the retrenchment had become absolutely necessary because of the critical financial position of the Respondent company and there was no question of having any discussion with the members of the complainant union prior to the said decision because there was no such custom usages or practice. It is the contention of the Respondent company that it is only because the Respondent did not accede to the demand of increase in the retrenchment benefits or compensation the complainant union started creating complication and filed a false complaint. According to them about 70% of the workers who were retrenched had no grievance and they had even encashed the cheques received by them before 4-8-1992.

11. The Respondent company further contended that allegations in the complaint are vague and the complainant ought to have stated specifically as to which of the provisions of law have been violated. They also contended that notices on retrenchment were not defective

and the cheques for current salary i.e. for the month of July 1992 were not attached because at that time D.A. for the said month was not announced. However, company also showed willingness to pay D.A. and all salary as per previous month. The company also denied the allegation that they have not issued notice to the State Government regarding retrenchment. On the contrary vide their letter dated 5-8-1992 they had issued such notice and it was received by the State Government.

12. The Respondent company categorically denied the allegations of the complainant union that no seniority list of workmen from different categories was put on the company's notice board as required under Rule 81 of Industrial Dispute (Bombay) rules 1957. A notice setting out the seniority list from different category was placed on the company's notice board on 22-7-1992. The company, therefore, contended that there is absolutely no breach of Rule 81 and the said Rule is not mandatory but it is a directory and as such that by itself would not in any event amount to unfair labour practice. They also denied the complainant's allegation of non observance of provisions of Section 9A or 25FFA of Industrial Disputes Act. According to the Respondent, they were not at all bound to give 60 days notice to the State Government prior to action in question.

13. The Respondent company denied the allegation that

Rule of last come first go under section 25 G of Industrial Disputes Act is not in-flexible. According to the company the complainant union has wrongly treated Exh-E attached to the complaint as seniority list. A bear perusal of the said Exh-E establishes that words in the title "Seniority list of Mackinnon Mackenzie and co. ltd. and asterisk represents those who are retained does not form part of the said document incorporated by the Respondents. According to the Respondent company the complainant has included the said portion in the said list. It is the contention of the Respondent company that the said document Exh-E to the complaint is a statement prepared by the Respondent for deciding the quantum of an annual increase. Besides this the Respondent Company contended that departure from rule "Last come first go" does not render retrenchment invalid where the employer is able to adduce satisfactory evidence in justification thereof. The Respondent, therefore submitted that they would adduce evidence for departure made in the said rule. According to them they had departed from the rule for valid consideration and as such retrenchment in question can not be held to be invalid on that count. It is their case that they have complied the provision of section 25F of the Industrial Disputes Act and not committed any unfair labour practice under Item 9 of Schedule IV of MRTU AND PULP Act. Hence on all these grounds the Respondent company prayed for dismissal of the complaint.

14. On these pleadings the learned Member, Industrial Court, framed issues at Exh.0-3. In order to prove its case, the complainant union examined as many as 9 witnesses. As against this the Respondent company examined 3 witnesses. After considering the evidence adduced by both the parties and hearing the argument of both the learned Advocates the learned Member Industrial Court came to the conclusion that there was no substance in the allegations made in the complainant union that Respondent company has committed breach of section 25F(b) and (c) of Industrial Disputes Act 1947 and there was no need of issuing notice under section 9A of the Industrial Disputes Act. He, however, held that company has failed to prove that they had published and displayed seniority list on 22/07/1992 as alleged by them. Thus, the Respondent company committed breach of Rule 81 of Industrial Disputes (Bombay) Rules, 1957. Besides this the company also committed breach of Section 25F of Industrial Disputes Act, 1947 and thus the Respondent company committed unfair labour practice and the retrenchment carried out by them was also illegal. He therefore allowed the application and granted declaration as mentioned above.

15. Being aggrieved by the said decision the Respondent company filed writ petition No. 2733 of 1996 and challenged the said order. On hearing the said writ

petition the Hon'ble Single Judge of this Court passed the following order.

> "In the present case in view of the breach of Rule, the Labour Court was right in passing the impugned order, hence, writ petition is rejected ".

16. The above mentioned order is challenged by the Respondent company in the present L.P.A.

17. In this appeal before us, Shri Cama, learned Counsel of the company has urged 3 points. Firstly, he submitted that the learned single judge of this Court has failed to consider that learned Industrial Court had not properly appreciated the evidence on record and relying on the interested words of the complainant's witnesses wrongly held that Respondent company had not displayed the list of seinority and notice on the notice board of the company on 22/07/1992 and as a result of the same there was breach of Rule 81 of the Industrial Disputes (Bombay) rules 1957. Secondly, he canvassed before us that learned single judge of this Court failed to consider the ratio of the case Chemical Mazdoor Sabha V. Vithal O. Pvt. Ltd. Raigad and others, wherein, the single Judge of this Court has clearly held that Rule 81 of the Industrial Disputes (Bombay) Rule 1957 is directory and not mandatory. Thirdly, the learned Counsel for the Respondent company argued before us that Apex Court has

held in M/s. Om Oil and Oil seeds Exchange Ltd. Delhi V/s. their workers that breach of section 25G of the Industrial Disputes Act would not per se make the action of the company malafide and as such can not be quashed ipso facto. Lastly, he submitted that the learned Single Judge of this Court should have held that the learned Industrial Court has failed to appreciate the reasons given by the Respondent company for deviation in observing Rule 25G of the Industrial Disputes Act. He therefore, submitted that Hon'ble Single Judge of this Court ought to have held that the learned Industrial Court clearly erred in holding that closure of the undertaking or part thereof amounts to retrenchment. He also submitted that the learned Industrial Court erred in holding that the action of retrenchment in question carried out by the Respondent company was illegal and it had amounted to unfair labour practice. Hence he submitted that the order passed by the Member, Industrial Court be quashed and complaint filed by the complainant union be dismissed.

18. As against this Shri Grover, learned Counsel for the complainant union supported the judgement and order passed by the Member, Industrial Court, as well as the hon'ble Learned Single Judge of this Court.

19. The first point which Shri Cama learned Counsel for

the company tried to urge before us is that the case in question is of closure and not of retrenchment as tried to be depicted by the complainant union. According to him the notice which is challenged in the complaint by the complainant union is a 'notice of closure' issued to the workmen by the company and it clearly indicates that termination of workers was made due to closure of all avenues of employment otherwise than those in (a) property development and (b) clearing and forwarding work. He strenuously argued before us that union has in fact deliberately proceeded on both grounds i.e. closure and retrenchment. According to him, the case is of closure and not retrenchment and consequently the provisions pertaining to retrenchment per se need not be considered. Before considering whether there is substance in the argument advanced by the learned Counsel for the company in this behalf, it would be worthwhile to see what "closure" and "retrenchment" means as per Industrial Disputes Act. For that purpose it would be worthwhile to reproduce definition of the above words.

Section (2) (cc)

> SECTION 2 (cc) (cc) "closure" means the permanent closing down of a place of employment or part thereof ;

> (oo) "retrenchment" means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as punishment inflicted by way of disciplinary action, but does not include-

20. Bearing in mind the above definitions if we see the pleadings of Respondent Company as well as the evidence on record then also it is very clear that case in hand is not a clear case of closure but it can only be said that it is pertaining to retrenchment arising out of a particular policy adopted by the company viz. curtailing certain activities and closing certain departments of the company. Even if we see the statement of reasons, attached to the notice issued to the workmen, then also we find that the company has nowhere stated therein that they have taken a decision to close down the business entirely. On the contrary, it is stated by them that as company is running into losses the Board of Directors after considering all aspects have taken the decision to rationalise the activities in Bombay office and closing down of its activities apart from the property owning and development and portion of clearing and forwarding business relating to the contracts with Government of India institution such as Central Railway and Lubricant India Ltd. Admittedly, it is not even the case of the company that they took the decision to retrench the

workers working in the respective departments which were to be closed. In case of closure, there is an end to the whole or to part of the industry on the other hand retrenchment is a termination of surplus or other employees during the subsistence of an industry. Therefore if the industry itself is no longer in existence there cannot be any subsisting employment from which workman can be retrenched. In the instant case even according to the company they were not having list of seniority of workers working in different categories departmentwise. So, admittedly, it was not a case where they had closed, for example, department 'X' and thereby removed or retrenched the workmen (in whatever capacity) working in the said department. Admittedly, it did not happen with the company close its all activities. On the contrary, some of the activities of the company were to continue even after 4-8-1992. So, the subsistence of Industry or the company was clearly contemplated and in fact accordingly the company continued. So, the case was certainly not a closure but of retrenchment as alleged by the complainant union.

21. Though, now the learned Counsel has tried to argue and called notice in question as a notice of closure, if we see the proposed correspondence and pleadings of the company then it is quite evident that the company itself has issued the notices in question as notices of retrenchment and not notices of closure. Even in

company's notice dated 4-8-1992 which is given by their Advocate P.Gopalkrishnan to the Advocate of union's Advocate Mr.Grover, the company had written that retrenchment has already come into effect in the light of the fact that M/s Urmila and Co. Pvt.Ltd and their associates have already occupied the premises of the company given to them. Incidently, it must be noted that the company had also mentioned that as they were not having sufficient funds and wanted to meet the debts and also pay compensation to retrenched workers they decided to give some premises out of the total premises of the company to Urmila and Co. Pvt. Ltd and their associates. Incidently, it must be noted that even according to the Respondent company they have complied with the legal provisions pertaining to retrenchment and issued necessary notice to the workmen who were to be retrenched. It is nowhere contended by the Respondent Company that they had issued notice of 60 days as contemplated under Section 25FFA(1) of Industrial Disputes Act. The said Sections says :

> 25FFA- Sixty days' notice to be given of intention to closed own any undertaking :-
>
> (1) An employer who intends to close down an undertaking shall serve at least sixty days before the date on which the intended

closure is to become effective, a notice in the prescribed manner, on the appropriate Government stating clearly the reasons for the intended closure of the undertaking : Provided that nothing in this section shall apply to -

(a) an undertaking in which -

(i) less than fifty workmen are employed, or

(ii) less than fifty workmen were employed on an average per working day in the preceding twelve months

(b) an undertaking set up for the construction of buildings, bridges, roads, canals, dams or for other construction work or project.

22. If really the Respondent company had an intention to resort to the policy of closure then certainly they had issued 60 days notice contemplated as per above section, but, admittedly, company has not done so and on the contrary tried to issue notice required for retrenchment.So, from all this material on record and the position of law we have no hesitation to hold that case

in question is not a clear case of closure as contemplated under Section 2(cc) mentioned above and it is the case of retrenchment. We are therefore not inclined to accept the argument advanced by the learned Counsel for Respondent company in this behalf.

23. The main and material grievance of the complainant union is that retrenchment process followed by the Respondent company is not in accordance with law and company has clearly violated relevant provisions of Industrial Disputes Act and Industrial Disputes (Bombay) Rules and thereby resorted to unfair labour practice. It is needless to say that all retrenchment is termination of service but all termination of services may not be retrenchment, if the same does not fall within the ambit of definition of retrenchment in Section 2(oo) of the Industrial Disputes Act. Further more, Section 25 prescribes the retrenchment of notice and compensation as a condition precedent to retrenchment of workmen. Section 25F introduces rule "last come first go" in effecting retrenchment of a workman. It is well settled that a termination of service without satisfying the above mentioned statutory requirement will be not retrenchment in eye of law. Naturally, non compliance of the same would render retrenchment invalid.

24. Shri Grover, learned Advocate for the complainant union argued before us that in the instant case there is

a clear cut violation of the provisions of Section 25G of Industrial Disputes Act and Rule 81 of Industrial Disputes (Bombay) Rule 1957. Section 25G of Industrial Disputes Act says

> 25G. - Procedure for retrenchment :- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workman in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman."

25. Both the learned Counsel argued on the point as to whether the provision of Section 25G of Industrial Disputes Act is directory or mandatory. However, even from the bear reading of the above section it is very clear that this provision means that generally when termination of service of one or more of workmen in an industry has to be made owing to abolition or reduction of post or posts, the workmen who should be selected for retrenchment in a particular category, must be the last

appointed one. This section provides that where any workman in an establishment is to be retrenched who belongs to a particular category of workmen in that establishment then in the absence of any agreement between the employer and workmen in this behalf, the employee shall ordinarily retrench the workmen who was the last person employed in that category, unless for reasons to be recorded, he retrenches any other workman. So, from the last portion of the above mentioned section it is very clear that principle embodied in this section can be departed and deviated from, in a case of agreement to the contrary or due to extra ordinary reason, which must be recorded in writing. So, to this extent 25G is directory and not mandatory in nature.

26. While considering compliance of above mentioned sections, we find that Respondent company has not come forward with clean hands and they have in fact resorted to the method of hide and seek. It was argued on behalf of the Respondent company that there were no proper pleadings on the part of the complainant union in this behalf. According to learned Counsel for the company Shri Cama, it was necessary for the complainant union to state specifically how and in respect of whom rule of last come first go is not followed. It was necessary for the complainant union to specifically plead that junior persons retained in the company and senior persons who have been retrenched were in fact of same ability, grade

and skill and as such there was no reason for the company to deviate from Rule 25G. However, with due respect we disagree with this proposition of learned Advocate for the company as the same does not stand to reasons. The bear reading of Section 25G of Industrial Disputes Act shows that power is given to the employer to deviate from rule but at the same time the Section makes it obligatory that said deviation must be for reasons recorded by the employer. If such reasons are recorded by the employer and the same are made known to workmen then they will be in a position to say and point out as to whether the said reasons are correct or not or where the same have gone wrong, but when employer has utterly failed to fulfil the statutory obligation of recording reasons for deviation how one can expect the employees or workmen to plead anything in that behalf. In the instant case there is nothing on record to indicate that the employer while carrying out the process of retrenchment has in fact recorded any such reasons. A feeble attempt is made on the part of the learned Counsel for the company to show that employer is not bound to show the said reasons at the time of retrenchment but the same can be shown for the first time in the court of law. However, this proposition is also very difficult to swallow. If we strictly take into consideration the language of Section 25G, according to us it in fact presupposes recording of reasons whenever retrenchment is made by not following the rule and there is deviation. When we find that

reasons are not at all given the question as to whether the same are valid and satisfactory or not in fact does not arise.

. The Respondent company has tried to place on record one list showing that at the end of such list reasons for deviation were given by the company. However, we find that the said list is in fact not duly proved by the company's witness and as such the same in fact cannot be read in evidence. There is absolutely not an iota of evidence on record to show that the company had in fact passed any specific order with regard to retrenchment of workers from different categories and from different sections and while deviating from Rule 25G recorded reasons for the same. While dealing with this aspect we may consider the evidence adduced by both the parties with regard to displaying of retrenchment notice and seniority list. Right from the beginning the complainant union had taken a stand that the company had never displayed the seniority list of different categories. However, it is the contention of the Respondent company that they had published such notice on the company's notice board on 22-7-1992. However, the complainant union has examined in all 9 witnesses and all of them have stated that at the relevant time they were working in the company and they used to pass by the side of the notice board but they never found any such seniority notice or list on the notice board as contended by the

Respondent company. It is true that all these 9 witnesses have been retrenched and as such they may be called as interested persons. However, at the same time it must be noted that there is nothing in their cross examination which would indicate that they are not trustworthy. What is more to be noted is that if really the company had displaced the notice and the seniority list as contended by them on 22-7-1992 it could have very well examined atleast few workers from the company who have not been retrenched but company has not done so. Not only that but if we see the evidence of the general manager of the Respondent company then also we find that his evidence is very vague and he has in fact no personal knowledge about many things that were happening in the company. He said that at the relevant time franking machine was not in operation while from the evidence of Awatarkar on record it is very clear that the said franking machine was in working condition at that time. This also shows that in order to keep the proposed retrenchment secret the notices to workmen were sent by using other franking machine.

27. The company could have very well adduced specific evidence as to when and who prepared the seniority list and typed the same, but they have nod done so. It is said by the General Manager that he put the said notices on the notice board, this also appears to be highly improbable. Normally, such high ranking officer, such as

general manager would not himself put the said notice on board. Besides this he has stated that when the notices and seniority list were put on board he took the photographs. This again appears to be improbable because in such big company anybody would prefer to call regular professional photographer and take the photographs through him because that would be an independent evidence. However, in the instant case the manager has stated that he took the photograph as if he had apprehended at that time that some complications may arise in respect of these notices and seniority list and workmen would damage it. He has stated that there are photographs which show that notice and seniority list were displayed and other photographs show that notice board and seniority list have been damaged. Admittedly, there is no specific evidence as to who damaged the said board or seniority list. Then again question arises when such things were done by the workers and when the same were so important and having grave consequences, why the general manager did not lodge any complaint about the same with the Police. It is true that some complaint is lodged by the licensees who had taken the premises from the company but admittedly they were introduced in the premises for the first time on 4-8-1992 so this itself shows that the evidence adduced by the company to show that notice regarding retrenchment and seniority list were displayed on the notice board is not at all trustworthy. The learned trial Judge has considered

entire evidence on this point minutely and has rightly held that evidence of the workers in this behalf is trustworthy and the evidence of Respondent company cannot be accepted and believed. So, he has recorded a finding of fact that no notice of retrenchment and seniority list were published by the company on the notice board on 22-7-1992 as contended by the Company. Naturally, there is no reason to interfere with the said finding of fact while exercising writ jurisdiction.

28. It is an admitted position that there was no departmentwise seniority list. According to the Respondent company seniority lists were as per category of workers. It is also not in dispute that even as per list that have been produced by the Respondent company Rule 25G was not observed in each category, but there is deviation in certain categories. As stated above there is no material on record to show that Respondent company deviated from usual Rule of 25G for valid and satisfactory reasons. Shri Grover, therefore, submitted that action of the management under such circumstances has to be held malafide and amounting to unfair labour practice. For this proposition he has laid his hand on a case **M/s Swadesamitran Ltd. V/s Their Workmen AIR 1960, 762** wherein the Apex Court has held that for valid reasons the management may depart rule of retrenchment. If the reasons for doing so are not valid or satisfactory the Tribunal can treat the management action as being

mala fide amounting to unfair labour practice. The proposition advanced by the learned Advocate for the Respondent company that manager can deviate from rule for valid and satisfactory reasons is not at all in dispute but in the instant case the management has miserably failed to show that when they deivated from the rule they recorded reasons for the same and the said reasons are valid and satisfactory. Similarly, even in **J.K.Iron and Steel Co. V/s Its workmen AIR 1960 SC 1288** t**he Ape**x Court has observed that if the employer departs from the rule of last come first go, without any acceptable or sound reasoning, a tribunal will be well justified to hold that the action of the management is not bonafide. It must be noted that it is only in his written submissions the learned Counsel for the Respondent company has tried to give some reasons for deviation from rule but as pointed out by us above the company had in fact not come with clean hands on this point and the learned trial Judge has rightly observed that there is no convincing evidence to show that proper seniority lists were displayed and deviation from the rule was for not valid reasons.

29. Shri Cama, learned Counsel for the Respondent company has laid his hands on a case **M/s Om Oil and Oil Seeds Exchange V/s Their Workmen AIR 1966 SC 1957** wherein the deviation from the rule made by the management was approved. The ratio of the said case is not at all

disputed and cannot be disputed but the facts of the said case and facts of the case in hand are totally different. In that case it was established that the clerk working in a particular branch of the business had shown particular aptitude performance and considering the said performance and his expertise the management felt in the interest of business to retain him though junior and retrench others though they were senior to him. Unfortunately, in the instant case the Respondent company has not adduced any such evidence and that is the exact reason due to which the learned trial Court held that there was clear breach of Section 25G of Industrial Disputes Act.

30. According to the learned Advocate for the Respondent company if there are no pleadings by the workmen that derivation made by the management in respect of Section 25G is not bonafide then the workers cannot be permitted to even raise or argue breach of Section 25G. For this he has tried to place reliance on a case **Workmen of Jorehaut Tea Co. V/s Its management AIR 1980 SC 1454.** However, the said case is of no use to the present company because here the company has not at all in fact published the seniority list. Besides, they had also not made known to all the workers as to who are the persons who have actually been retrenched and what is their seniority. When there was nothing on record for the workmen to come to know that there is deviation from Rule 25G the question of having pleadings that deviation is

malafide does not arise. In such a case when workmen plead that there is a breach of Section 25G the same is certainly sufficient. It is for the company to establish as to whether there is no deviation and if there is deviation it is for the valid reasons. As pointed out by the learned Advocate for the complainant Union even in a case **Industrial Chemicals Ltd. V/s Labour Court 1976 LLJ Madras 137** it has been held that in case of departure from the rule of "last come first go" the employer must assign reasons for retrenching workmen from service and record them in the notice of retrenchment. This is not done by respondent company in present case. So, the above stated case is also of no use to the Respondent Company.

31. The learned Counsel for the Respondent Company has also tried to take aid of some other reported rulings such as : **(i) Jatinder Kumar and Ors. V/s State of Punjab 1985 (I) SCC 122 (ii), Bharat Forge Co. Ltd. V. Uttam Manohar Nakate 2005 1 CLR 533.**

32. However, the facts of these cases are quite different and they in fact do not support the case o the present Respondent company. For example, in the later case the Court observed that the complainant must set out in the first instance the deviation to show that the management has adopted unfair labour practice and only then the other side be asked to lead evidence to rebut

the same. In the present case by specifically raising plea that provision of Section 25G of Industrial Dispute Act have been followed by the Respondent company, the complainant union had in fact laid foundation regarding their grievance. Thereafter it was necessary for the Respondent company to adduce sufficient evidence to rebut the same and show that provisions of section 25G of Industrial Disputes Act are complied. However, as mentioned above Respondent company did not adduce any satisfactory evidence and as a result of the same the learned trial Court held that there was breach of Section 25G of Industrial Disputes Act.

33. At the cost of repetition it must be observed that in the instant case the Respondent company has failed to establish that for reasons recorded by them they deviated from Rule 25G. They failed to prove from the seniority list the retrenched workers and the reasons for retrenchment for particular workers. If the Respondent company had adduced such evidence then complainant union was bound to rebut the said evidence but as the Respondent company itself failed to mention the reasons for deviation the question of complainant union pleading that said deviation was not bonafide does not arose. Thus, after careful scrutiny of the entire evidence and position of law we have absolutely no hesitation to hold that in the instant case there was clear cut breach of Section 25G by the Respondent company.

34. The learned trial Judge has specifically held that the Respondent company had in fact not published the notice as well as the seniority list on the notice board as contended by them. It is in fact established that defendant company had tried to keep every thing in secret and for that purpose only they had not displayed any notice of retrenchment on the notice board initially. They preferred to send the notices to the workers who were to be retrenched by RPAD. Though usually the letters from the company are sent after franking at the company's machine for the notices in question the said machines was not used and some different machines was used. That was obviously with a view that workers should not come to know early about the process of retrenchment. The learned trial Judge has rightly recorded the finding that 7 days notice as contemplated in Rule 81 of the Industrial Disputes (Bombay) Rule 1957 was not issued in the instant case. The said finding of fact is based on the evidence on record and proper appreciation of the same. We therefore feel that the same is unassailable.

RULE 81 OF INDUSTRIAL DISPUTES (BOMBAY) RULES, 1957 says ---

> 81. Maintenance of seniority list of workmen - (1) The employer shall prepare a list of all workmen in the particular

> category from which retrenchment is contemplated arranged according to the seniority of their service in that category and cause a copy thereof to be posted on a notice board in conspicuous place in the premises of the industrial establishment at least seven days before the actual date of retrenchment.

35. Shri Grover, learned Counsel for the complainant union submitted that above mentioned Rule is mandatory and breach of the same amounts to unfair labour practice. For this proposition he has placed reliance on a case **Navbharat Hindi Daily V/s. Navbharat Shramik Sangh- 1985 (I) LLJ Bombay 474** wherein it has been held that **Section** 25G can be followed only if seniority list has been prepared in accordance with the rule 81. The intention of such a list is to allow workmen to object to the said list and thereby avoid hardship. The exhibition of such a list is with a view to protect the interest of workmen and to provide safeguard against Section 25G and as such Rule 81 casts an obligation on the employer to strictly follow it. In fact it is very clear that Rule 81 has been introduced to ensure due compliance of Section 25G of Industrial Disputes Act. For this useful reference an be made to a case **Trade Wings Ltd. V/s. Prabhakar 1992(1) LISSOM 9.** The learned Counsel for the complaint union has also drawn our attention to a case **Prakash M.**

Dalal V/s. Tata Engineers Locomotive 1996(1) LYSOL 13 wherein also it has been held that provisions contained in Rule 81 is for effective compliance of Section 25G and is mandatory and its breach would definitely vitiate any order of retrenchment of a workmen since in the absence of a seniority list. Compliance of Section 25G cannot be checked and verified. Thus there is catena of rulings in which it has been held that Rule 81 is mandatory. However Shri Cama, learned Advocate for the Respondent company vehemently argued before us that in **Chemical Major Sabah V/s. Vistas Organic (1995) IS SLUR 466** the learned single Judge of this Hon'ble Court (Coram:Shrikirshna J as His Lordship then was) has held that Rule 81 per se is only directory rule and not mandatory. The learned Counsel for the union however submitted that as in the case of Navbharat Daily Case, Division Bench of this Court has held that Rule 81 is mandatory, that decision holds the field and should be accepted. As against this, it was canvassed before us by the learned Advocate for the Respondent company that learned single Judge has in fact considered the observations in N.B. Hind Oil and has observed that Division bench has not laid down the proposition that Rule 81 per se is mandatory. However, as in the instant case there is clear cut breach of Section 25G of Industrial Dispute Act and Rule 81 of the Industrial Bombay Rule 1957, cumulative effect of the same is that action of retrenchment taken by the management is totally

illegal and amounts to unfair labour practice.

36. We are therefore of the view that the learned trial Judge has rightly declared that Respondent company has committed unfair labour practice under Item 9 of Schedule VI of the M.R.T Act 1971 by not displaying the seniority list as provided in Rule 81 of Industrial Disputes (Bombay) Rules 1957 at the time of retrenching workers and by committing breach of Section 25G of Industrial Disputes Act by not following the Rule of lst come first go and for not recording the reasons for deviation from the said Rule. The order passed by the learned Member, Industrial Court was legal and correct and therefore, the learned single Judge of this Court rejected the writ petition filed by the Respondent company. Thus, there is no substance in this appeal. In view of above, the Letters Patent Appeal is dismissed with costs.

(S.R.SATHE,J.) (S.B. MHASE,J.)

. At this stage the learned Counsel for the Appellant submitted that there was an interim stay which may be extended for a period of 12 weeks. The learned Counsel for the other side has no objection. Therefore, interim order to continue for a period of 12 weeks, so as to enable the Appellant to approach the appropriate forum.

(S.R. SATHE,J.) (S.B. MHASE,J)